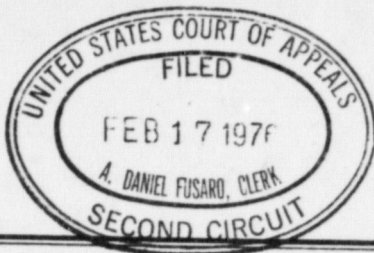


***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
REPLY BRIEF**





75-7426

IN THE  
**United States Court of Appeals**

FOR THE SECOND CIRCUIT

Docket No. 75-7426

IRVING STOLBERG,

*Plaintiff-Appellant,*

—v.—

MEMBERS OF THE BOARD OF TRUSTEES FOR THE  
STATE COLLEGES OF THE STATE OF CONNECTICUT,

*Defendants-Appellees  
and Respondents-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CONNECTICUT

**REPLY BRIEF OF PLAINTIFF-APPELLANT**

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
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**REPLY BRIEF OF PLAINTIFF-APPELLANT**

The brief of defendants and respondents ("D&RBr.") overlooks or seeks to avoid or minimize several salient facts that are not subject to dispute:

1. the condition in respect of which action was taken to suspend plaintiff's Southern Connecticut State College ("SCSC") salary payments since November of 1974, namely, his holding a seat in the General Assembly, has existed since the beginning of 1971, which period includes: the time of the pretrial conference in this action; the time of the trial; the time of the judgment in March of 1972 ordering plaintiff's reinstatement at SCSC; the period of the earlier proceedings on appeal to this Court; the time at which,

in response to plaintiff's inquiry what action the Office of the Attorney General would take if plaintiff accepted reinstatement while holding his seat in the legislature, the Attorney General responded that defendant trustees would comply with the letter and spirit of the reinstatement order and "are holding open the doors to SCSC whether [plaintiff returns] for the 1973-1974 school year or the 1974-1975 school year"; and the time of plaintiff's reinstatement; (Pl. Br. 7-13.)

2. at all such times, defendant trustees were represented by the same Assistant Attorney General and Attorney General, respondents Giber and Killian, and those respondents are the same attorneys who advised respondent Comptroller Agostinelli that plaintiff "cannot hold the position of Assistant Professor at Southern Connecticut State College" from January of 1971 forward, leading to the suspension of plaintiff's salary twelve weeks after his reinstatement; (Pl.Br. 7-18; J.A. 12a-15a, 19a-26a, 57a-60a, 65a-74a, 85a, 106a-109a.)
3. in spite of the apparent conflict between the positions taken by the trustees and the Comptroller in the fall of 1974, respondent Attorney General refused to communicate plaintiff's views on this matter to the trustees and the Comptroller, asserted that the "general supervision of the legal matters of the state is vested in the Attorney General", and deemed it inappropriate for plaintiff "to directly contact our clients"; (J.A. 47a, 49a-50a, 65a-72a, 75a-84a.)

Two additional matters appear to be beyond dispute on the basis of defendants' and respondents' brief. Plaintiff continues to fulfill his duties as Assistant Professor at SCSC, has continued to do so since the fall of 1974, and without salary payments since November of 1974, and is expected by defendant trustees to continue to fulfill those duties. (D&RBr. 4-5, 6.) It is also clear that Connecticut's Comptroller is to pay salaries and wages of state employees such as plaintiff between ten and fifteen days after the close of the payroll period in which services were rendered. Conn.Gen.Stats. §3-119 (D&RBr. 6-7, 4a-5a; J.A. 107a-108a.)

**A. Arguments as to *res judicata* and  
"collateral estoppel."**

Defendants and respondents argue that the doctrines of *res judicata* and "collateral estoppel" do not apply here. (D&RBr. 16-18.) In the most precise terms, *res judicata* and "collateral estoppel" are called upon in a second and separate action when a former judgment is invoked to preclude relitigation of a fact, issue, or claim. *Res judicata* may be called upon when the second action is brought on the same cause of action as that in which the former judgment was granted; "collateral estoppel" applies to circumstances in which the second action is on a different cause of action but involves the same parties or some of the same parties. *Siegel v. National Periodical Publications, Inc.*, 508 F.2d 909, 913 n. 1 (2d Cir. 1974).

Here, a separate action is not involved. The contempt proceedings were brought on to require compliance with and to avoid the frustration of the judgment in the same action. As this is not a separate action, *res judicata* and

"collateral estoppel" may not apply in their most technical forms, but the reasons underlying those doctrines have all the more force here.

The authorities cited by plaintiff rest not upon the precise application of those doctrines but upon the interests served by them and the policies supporting them: the need to avoid repetitious litigation; the need to establish and adjudicate completely the rights of parties to pending litigation designed to give full and final relief and administer complete justice; and the interest in giving finality and reliability to final judgments. (Pl.Br. 31-35.)

In the language of *United States v. Swift & Co.*, 286 U.S. 106, 119, 76 L.Ed. 999, 1008, 52 S.Ct. 460 (1932):

"... The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting."

See, also, *Schildhaus v. Moe*, 335 F.2d 529, 530 (2d Cir. 1964).

**B. Arguments as to "necessary" character of issue of plaintiff's right to reinstatement while a member of the legislature.**

Defendants and respondents discuss briefly the question of "necessity" as a test of whether an issue pertinent to one action may be relitigated in another. (D&RBr. 17-18.) There is no fact question here. Plaintiff was a faculty member at SCSC through the academic year 1968-1969, when he was dismissed. He was a member of the Connecticut legislature from January of 1971 on. The issue here in

question, which clearly could have been raised as a defense but was not, is that referred to by defendants and respondent Attorney General and Assistant Attorney General in their Pretrial Memorandum (J.A. 12a-15a), and which the pretrial report authorized them to plead (J.A. 16a, 117a-120a): whether plaintiff could be reinstated during his term as a member of the legislature.

The question whether the issue was actually litigated is not decisive. An issue may be litigated but "not necessary to the rendering of the prior judgment". See, for example, *Halpern v. Schwartz*, 426 F.2d 102, 105 (2d Cir. 1970). On the other hand, an issue, such as a defense that could have been raised but was waived, may be necessary to the decision or judgment but unlitigated.

To bar further litigation among parties on an issue, it must have been "necessary". "The requirement that the issue to be barred must have been necessary to the decision in the first litigation is well entrenched in the law." *Lynne Carol Fashions, Inc. v. Cranston Print Works Co.*, 453 F.2d 1177, 1183 (3d Cir. 1972) (Footnote and citations omitted.)

The trial court found that equitable relief was "clearly appropriate" and ordered that plaintiff be reinstated in his faculty position with tenure and with equivalent seniority. (J.A. 33a-34a, 37a-38a.) It was clearly "necessary" to this decision that plaintiff be adjudged to have had the right to be reinstated at that time, whether because defendants waived the defense and avoided the need to litigate it or in other circumstances in which it had been litigated. Otherwise, defendants could frustrate relief and cause repetitious litigation by raising defenses *seriatim*.

**C. Arguments as to persons bound by the 1972 judgment.**

Defendants and respondents appear to concede that defendant trustees are bound by the 1972 judgment. (D&R Br. 6.) Although, under Rule 65(d), F.R.Civ.P., respondents Giber and Killian are explicitly bound as defendants' attorneys, they nowhere concede that such respondents are bound. (D&RBr. 9-10.) Defendants and respondents cite the statutory provision giving defendant trustees governing power over the State Colleges and the power to employ faculty, fix their compensation, and establish terms and conditions of employment. Section 10-109b, Conn.Gen. Stats. (D&RBr. 10, 6a-7a.) They also refer to the provisions that require the Comptroller to pay all state salaries and wages. Section 3-119, Conn.Gen.Stats. (D&R Br. 10, 4a-5a.)

In referring to the statutory power and duties of the Comptroller and of the defendant trustees (D&RBr. 10), defendants and respondents omit a significant statutory provision relating to defendant trustees, Section 10-329a, Conn.Gen.Stats., and add an irrelevant provision relating to the Comptroller, Section 3-112, Conn.Gen.Stats. As stated in their brief, "the function to pay salaries belongs to the State Comptroller under §3-119," Conn.Gen.Stats. (D&RBr. 6-7), and it is that provision rather than Section 3-112 that is pertinent here.

Section 3-112 does refer to powers and duties of the Comptroller, including the duty to "adjust and settle" demands against the state. Under Article IV, Section 24, of the 1965 Constitution of Connecticut, and the predecessor sections in the 1955 and 1818 Constitutions, the Comptroller is to "adjust and settle all public accounts and demands", and,

in addition, the "general assembly may assign to him other duties in relation to his office, and to that of the treasurer . . . ." It is not necessary to trace these provisions and their statutory counterparts thoroughly to show that the function of "adjusting and settling" is entirely separate from that of making salary payments to State College faculty members. Under Section 3-112, the word "adjust" means "to determine the amount equitably due in respect to each item of each claim or demand." Lest defendants and respondents attempt to argue that the Comptroller has some power of equitable revision over faculty salaries as determined by defendant trustees, we cite Section 10-329a, Conn.Gen.Stats., and certain related provisions.

Chapter 178, Conn.Gen.Stats., provides for Connecticut's "State System of Higher Education". Under Section 10-322, the "state system of higher education" is defined to include The University of Connecticut, the state colleges, and several other institutions. Southern Connecticut State College is one of Connecticut's four State Colleges. Section 10-109. It is governed by defendant trustees. Sections 10-109a, 10-109b. The trustees are required to "expend the funds provided for the support of state colleges . . . ." Section 10-110(a).

Section 10-329a provides in pertinent part:

"Notwithstanding the provisions of any general statute or special act to the contrary, the selection, appointment, assignment of duties, amount of compensation, sick leave, vacation, leaves of absence, termination of service, rank and status of the individual member of the respective professional staffs of the system of higher education shall be under the sole jurisdiction of the respective boards of trustees within available funds, . . . ."

This plainly overrides any other statutory provisions and gives the defendant trustees full powers over the details governing State College professional staffs, including the amount of their compensation, and, consequently, nothing in Section 3-112 would allow the Comptroller to alter the amounts fixed by defendant trustees as faculty salaries.

It is clear from stipulations entered into below and statements by defendants and respondents in their brief that defendant-trustees continue to prepare payrolls with plaintiff's name on them and respondent Comptroller and members of his staff continue to withhold and fail to deliver payroll checks to plaintiff. (D&RBr. 4-5, 6-7; J.A. 108a-109a.) Under the circumstances conceded by defendants and respondents (D&RBr. 10-11) in which the Comptroller routinely and generally pays the salaries of faculty members employed by defendant trustees, the Comptroller is "legally identified" with defendant trustees so that under the rule of the cases cited at pages 34 to 36 of plaintiff's brief, including the *Alemite* decision cited by defendants and respondents, also (D&RBr. 10), the Comptroller and his staff are also bound by the judgment. Otherwise, a court order requiring reinstatement with tenure and equivalent seniority would be, in effect, an order only to grant a position without one of its most important concomitants, salaried compensation. This would be an illusory remedy at best.

Under the particular circumstances of these proceedings, Rule 65(d) has broader scope because of the actions of the Office of the Attorney General in representing defendant trustees throughout, advising the Comptroller with the result that plaintiff's salary has been suspended, and

continuing to represent not only defendants but also respondents.

**D. Arguments as to concerted representation  
and dovetailed positions of defendants  
and respondents.**

Before the proceedings now under review were commenced, plaintiff advised the Office of the Attorney General of the apparent disparity of views among the Board of Trustees for the State Colleges, the Office of the Attorney General, and the State Comptroller, and asked that they be advised of plaintiff's views. (J.A. 75a-82a.) The response of respondent Attorney General stated, "... the general supervision of the legal matters of the state is vested in the Attorney General and as we have found no reason to alter the tenor of our advice to our clients, we do not deem it appropriate to forward your opinion, nor do we deem it appropriate for you to directly contact our clients." (J.A. 83a-84a.)

Defendants and respondents attempt to support their position that they are all to be represented by the Attorney General, even if among them there are conflicting interests or positions, on the ground that Section 3-125, Conn.Gen. Stats., renders them all statutory clients of the Attorney General. (D&RBr. 8, 10, 20.) However, the practice of attorneys in Connecticut is governed by the rules and orders of the courts, including the Code of Professional Responsibility of the American Bar Association, which Code is recognized by the District Court, also. Section 51-84, Conn.Gen.Stats.; Local Rule 2(f), Connecticut District Court; *Heiberg v. Clark*, 148 Conn. 177, 169 A.2d 652 (1961); *International Electronics Corp. v. Flanzer*, Nos. 75-7159, 75-7216 (2d Cir. Dec. 22, 1975), at 1154; *Quist v.*

*Connecticut Commission on Human Rights and Opportunities*, Docket No. 5055, Court of Common Pleas, Tolland County, November 10, 1975, 44 U.S.L. Week 2249 (Dec. 9, 1975).

Under Disciplinary Rule DR 5-105(C) of the Code, a lawyer may represent multiple clients only if "... it is obvious that he can adequately represent the interests of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each." In the light of that provision and related portions of the Code, we can only conclude that each defendant and respondent was fully aware of and approved the position asserted on behalf of each.

Defendant trustees had expressed their view that the District Court had required them to return plaintiff to Southern Connecticut, that at the time of the District Court's ruling plaintiff was a member of the General Assembly, and that in view of those facts "the Trustees believe it would be inappropriate for them to raise any questions" concerning plaintiff's position on the faculty. (J.A. 63a-64a.) Nevertheless, the Attorney General did not make any attempt to support this position either in his advice to the Comptroller or in the proceedings below by advancing the reasonable argument that the judgment, in the light of those facts, secured plaintiff's faculty position and bound the Comptroller, also, whatever question might be raised about his General Assembly seat.

In attempting to justify the advice given by the Attorney General to the Comptroller, defendants and respondents omit the fact that the Attorney General ignored

the special circumstances referred to by defendant trustees that the "dual job ban" defense to reinstatement had been abandoned and plaintiff ordered reinstated while he was a member of the General Assembly. (D&RBr. 20.) In such circumstances, and without separate representation, each of the defendants and respondents has affirmed the position taken on behalf of each of the other defendants and respondents.

**E. Arguments as to plaintiff's alternative courses, equitable discretion, and fairness.**

Defendants and respondents suggest that plaintiff should have pursued alternative courses by bringing an action in mandamus or a declaratory judgment action. (D&RBr. 22.) First, this ignores the fact that plaintiff obtained what should have had the effect of a binding and conclusive judgment that, in the light of the conditions existing in 1972 with plaintiff holding a seat in the General Assembly, plaintiff was entitled to reinstatement with tenure and equivalent seniority. It is difficult to conceive a reasonable argument that that judgment was subject to the interpretation that it did not have to do with salaried compensation. Second, this ignores the fact that it was defendants and respondents Giber and Killian at whose instance the "dual job ban" defense was to have been raised, who did not raise it, and who offered reinstatement in open court when plaintiff was serving in the General Assembly. Third, this ignores the fact that plaintiff inquired of the Attorney General before reinstatement what action the Attorney General and defendants would take if plaintiff held his seat in the legislature and accepted reinstatement and was advised that defendants would comply with the letter and spirit of the judgment and were "holding open the doors".

(J.A. 105a-106a.) Fourth, this ignores the fact that every effort by plaintiff in the fall of 1974 to resolve the dispute by a declaratory judgment action or other means while preserving the *status quo* was quickly rebuffed. (J.A. 75a-84a; R.Doc.No. 4, Exhs. 47, 48.) (A declaratory judgment action is privileged in respect to assignment for trial if brought by the State, but not if brought against the State, and it has notice requirements that may entail considerable expense. Sections 213, 309(d), *Conn. Practice Book* (Current).) Finally, this ignores the fact that the District Court suggested that the State seek a declaratory judgment, but the State did not. (J.A. 124a-125a.)

As a consequence of the State's refusal to bring a declaratory judgment action, plaintiff has instituted such an action and a second action under the Civil Rights Act of 1871, the latter on the grounds that the suspension of plaintiff's salary payments without a prior hearing and while plaintiff holds a tenured position infringes upon plaintiff's federal due process rights.

These matters have transpired in spite of the fact that the equitable relief granted in 1972, reinstatement with tenure and equivalent seniority, was inseparably enmeshed with the monetary damages awarded by the District Court and affirmed in part by this Court on the ground that reinstatement was also part of the relief and with no intimation of any infirmity as to salary payments.

All of this should be considered in the light of the plain fact that the Connecticut prohibitions on which the suspension of plaintiff's salary is based have to do with the holding or accepting of two offices or positions and have nothing to do with whether none, one, or both, of those

offices carries compensation with it. (D&RBr. 1a-2a.) In other words, the actions of the Attorney General and Comptroller in suspending plaintiff's salary do not in any way advance any legitimate state interest under the "dual job ban" provisions. Plaintiff continues to hold both positions and is expected to continue to fulfill his faculty duties. (D&RBr. 5-6.)

The sequence of actions and positions taken by defendants and respondents can only be considered to require plaintiff to resort to further litigation to protect his tenured status and to protect the value of his faculty service while the questions now raised by defendants and respondents once again are forced to final resolution. Thus, the interests and policies of avoiding multiple or repetitious litigation would be defeated.

Plainly, the District Court and this Court have broad equitable discretion in proceedings such as these. But the District Court is not at liberty to reverse an injunction in its application to the conditions that existed at its making, "under the guise of readjusting." *United States v. Swift & Co.*, cited at page 4, above. Whether the action of the court below in not upholding the requirement of salary payments is described as "clarification", "modification", or "readjustment", it is clear that the interpretation which leaves plaintiff with tenured status and the obligations of that status, but without a salary, is untenable.

Equitable remedies, particularly those molded in respect of the period of time in which doubtful constitutional questions, whether state or federal, are resolved by adjudication, "are a special blend or what is necessary, what is fair, and what is workable." *Lemon v. Kurtzman*, 411 U.S. 192, 200-201, 36 L.Ed.2d 151, 161, 93 S.Ct. 1463 (1973).

The result below goes beyond such discretion in effectively modifying or reversing the earlier judgment. In addition to that, the result is neither necessary nor fair; it is both oppressive and unfair; it advances no legitimate state interest; and it defeats the principles that serve the interests and policies of avoiding multiple and repetitious litigation and making the processes of litigation, when they are invoked, serve to bring about a final and complete adjudication.

### CONCLUSION

Plaintiff-appellant respectfully requests this Court, for all of the foregoing reasons, and for the reasons in plaintiff-appellant's main brief, to vacate the judgment below entered June 25, 1975, and the order entered June 27, 1975, on plaintiff's motion for interim order re salary payments, and to reverse and remand the cause with a direction for a finding of contempt, for the entry of appropriate equitable orders to protect plaintiff's status as secured by the 1972 judgment until a final determination of the matters at issue between and among the parties, and for such further proceedings in the District Court and such further relief as are deemed appropriate.

Respectfully submitted,

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STATE OF NEW YORK,  
COUNTY OF NEW YORK, ss.:

Joseph Boselli, being duly sworn, deposes  
and says, that on the 17 day of Feb 1976, at 3 o'clock  
P.M. he served the annexed Reply Brief of Plaintiff-Appellant  
No. 75-7426 in Re: Irving Stolberg v. Members of the Board of  
of the State of Connecticut  
upon Carl R. Ajello, Attorney General

Esq(s)., Attorney(s)

for Defendants-Appellees and Respondents-Appellees

by depositing 2 true copies

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30 Trinity Street  
Hartford, Conn. 06115

that being the address designated in the last papers served herein by  
the said attorney.

Sworn to before me this

day of February 19 76

*John Alusick*  
JOHN ALUSICK  
Notary Public, State of New York  
No. 31-6002133  
Qualified in New York County  
Commission Expires March 30, 1978